No. 552. Nov 16.

Reply Brief for Defendant in Error on Motion to Dismiss Writ of Error.

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Supreme Court of the United States.

The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company,

Plaintiff in Error,

No. 552.] ***vs.***

The Long Island Loan and Trust Company, Executor of Charles R. Lynde, Deceased.

Defendant in Error.

REPLY BRIEF FOR DEFENDANT IN ERROR ON MOTION TO DISMISS WRIT OF ERROR.

E. W. KITTREDGE,
JOSEPH WILBY,
For Defendant in Error.

The Robert Clarke Company, Printers, Cincinnati. [*October, 1896.*

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Plaintiff in error has filed two briefs in opposition to the motion to dismiss the writ of error in this case; and we should have no occasion to reply to them but for the misapprehension, and consequent misstatement, of the facts disclosed by the record.

In the brief of Mr. Maxwell, page 2, it is said that:

> "The facts alleged in that defense, in the answer, with reference to those proceedings (the foreclosure suits) are all established by the special finding of facts."

This is a mistake. The answer alleged that Archibald Parkhurst, the trustee under the Lynde mortgage, was made a party to the foreclosure proceedings, and was duly served with process according to law, or appeared therein. (R., 16.)

This fact is *not* established by the finding of facts in the state court. But, on the contrary, it is established by the finding of facts that "the actions for the foreclosure of said

mortgage, and for other purposes, did not affect the Parkhurst mortgage aforesaid, or the bonds thereby secured." (R. 34.) And it is further established by the finding in the state court, which is not alleged in the answer, that the decree in the foreclosure suits in the federal courts provided that the property should be sold subject to the Parkhurst mortgage and without prejudice to the bonds secured thereby. (R. 36.)

Now, something more is necessary to present a federal question than, as stated by Mr. Burr (Brief, page 3), that it should appear that a case was made "where a title or right is *claimed* under an authority exercised under the United States, and the decision of the state court was in denial of the right or title so asserted." It must appear by the record upon what the *claim* thus made was founded, and that the judgment of the federal court, under which the title or right claimed is asserted, was one which bound the adverse party. It does not appear what were the issues in the foreclosure suits, and as neither Mr. Lynde nor any person representing him is shown by the record to have been a party to those suits in the federal courts, the judgments in those cases could not affect him.

The case cited by our learned adversaries decided by this court, *Embry* v. *Palmer*, 107 U. S. 3, states the rule as to when a federal question is raised in such a case, and it is when a state court refuses to give effect to the judgment of a court of the United States, "rendered upon a point in dispute, and with jurisdiction of the case and of the parties." This record does not show that the state court had before it any such judgment of the federal courts.

The only question in the case then is, was the appointment of a receiver by the federal court to take possession of the property, subject to the prior mortgage, in an action to which the prior mortgagee was not a party, such an order as to affect the lien of a *bona fide* holder for value of the bonds

secured by the prior mortgage? No question was raised or can be raised upon the facts found by the court below in respect to the authority of an agent to execute commercial paper or to antedate it. If such a question could be raised, it would not be a federal question. If it were true, as Mr. Maxwell argues, that the state court substantially held that Mr. Lynde was entitled to claim that his bonds became a lien at the time they bore date, and that this was erroneous, still this court can not review that holding. But the finding of the court is expressly that the mortgage and the bonds in question were executed in October, 1864, and at that time duly certified by the trustee; the bond containing an express provision that it should be transferable by delivery, and in effect that it should become obligatory when so authenticated by the trustee (R. 7). The state court held that these bonds did become obligatory when they were so executed. It further decided that placing the bonds in the possession of the president of the company, long before the receivership, was a sufficient delivery to validate them in the hands of an innocent purchaser. We respectfully submit that these holdings of the state court present no federal question; and these rulings were conclusive of this case, irrespective of any question as to the creation of a lien pending the receivership.

DeSaussure v. *Gaillard*, 127 U. S. 233 *et seq.*
Hopkins v. *McClure*, 133 U. S. 386.

So also the proposition, ingeniously argued by our learned adversaries, that Mr. Lynde was estopped because he did not make himself a party to the foreclosure suit, but permitted the plaintiff in error to purchase the railroad upon the assumption that Mr. Lynde's bonds were not secured by the Parkhurst mortgage, presents a question that was concluded by the judgment of the state court, and can not be reviewed by this court.

Yet again, the state court decided that the bringing of the foreclosure suits and the appointment of a receiver did

not create a *lis pendens* which would affect the validity of the title of a *bona fide* holder of commercial paper, or of a mortgage security as an incident to that title, which was in accordance with the repeated decisions of this court.

In the closing paragraph of Mr. Maxwell's brief, it is stated that the defendant, upon a pretense, which was a mere excuse, brought a vexatious suit in the Circuit Court for the District of Indiana, which, having been decided in the defendant's favor, is now pending on appeal in the Circuit Court of Appeals for the Seventh Circuit. The Circuit Court for the District of Indiana, and the Supreme Court of Ohio, have both decided that the appellee's claim in that case was not a pretense, and the statement of the brief is an impertinent reflection both upon the appellee and its counsel.

The appellant's claim in the Circuit Court of Appeals is that the judgment in the state courts of Ohio is a bar to the proceeding in the Circuit Court of Indiana, and its judgment should therefore be reversed. In this Court its claim is that the judgment of the state courts of Ohio should be reversed. And appellant's counsel have by brief suggested to the Circuit Court of Appeals the pendency of this writ of error in the Supreme Court apparently to delay the decision of the Circuit Court of Appeals. In this Court it is suggested by them that the pendency of the case in the Circuit Court of Appeals should induce this Court to overrule the motion to dismiss this writ of error.

It does thus seem, if it is proper, as Mr. Maxwell says it is, to go outside of this record, that this writ is prosecuted "for delay only;" and this appears also by the record as well as that the question on which the jurisdiction depends is so frivolous as not to need further argument.

Respectfully submitted,

E. W. KITTREDGE,
JOSEPH WILBY,
For Defendant in Error.